KNM Process Systems Sdn Bhd v Ceca Gold Company Ltd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(C)(A)-1701-09 OF 2021
MOHAMAD ZABIDIN, ABU BAKAR JAIS AND NORDIN HASAN JJCA
12 DECEMBER 2022

Civil Procedure — Injunction — Injunction to restrain — — Appellant applied for injunction to restrain first respondent from receiving proceeds from bank guarantee — High Court dismissed application — Whether declaratory order could be issued — Whether second respondent could be restrained — Whether appellant could be protected by s 7 of Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) Act 2020 ('Act 829') — Whether first respondent's action was unreasonable and unconscionable in calling bank guarantee — Whether Malaysian statutory provision could be ignored in view of Singapore law applicable — Whether Malaysian law was to be applied — Whether terms of s 7 of Act 829 had extra-territorial application

The first respondent, a Myanmar company, awarded the appellant a contract ('EPC contract'). Pursuant to the EPC contract, the appellant was to provide a bank guarantee to the first respondent which was later deposited in the second respondent by the appellant. Subsequently, disputes arose between the appellant and first respondent regarding the performance of the EPC contract. As a consequence, by a letter dated 17 May 2021, the first respondent gave the notice to terminate the EPC contract. Prior to that, by way of a letter dated 10 May 2021 to the second respondent but without notifying the appellant, the first respondent demanded from the second respondent the sum under the bank guarantee. Only on 19 May 2021 the first respondent informed the appellant of the demand to the second respondent. The appellant filed an originating summons ('OS') for among others, an injunction to restrain the first respondent from receiving the proceeds from the bank guarantee. The learned High Court judge dismissed the appellant's OS and hence this appeal. The issues for consideration were: (a) whether a declaratory order could be issued; (b) whether the second respondent could be restrained; (c) whether the appellant could be protected by s 7 of the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) Act 2020 ('Act 829'); (d) whether the first respondent's action was unreasonable and unconscionable in calling the bank guarantee; (e) whether the Malaysian statutory provision could be ignored in view of the Singapore law applicable; (f) whether Malaysian law was to be applied; and (g) whether the terms of s 7 of Act 829 had extra-territorial application.

Held, allowing the appeal:

(1) The learned High Court judge ('HCJ') erred in his conclusion that pursuant to s 11 of the Arbitration Act 2005 ('the AA'), only interim orders could be granted but not a declaratory order. In *KNM Process Systems Sdn Bhd v Lukoil Uzbekistan Operating Company LLC* [2020] MLJU 85, a declaration was indeed granted restraining the calling of the bank guarantees. Further, in *Kining Exeton Sdn Bhd v Majlis Perbandaran Kuantan & Anor* [2020] MLJU 343, also granted such declaratory order. Thus, a declaratory order and not merely interim orders could be given pursuant to s 11 of the AA (see paras 23 & 25–26).

(2) Although the second respondent was not a party to the arbitration agreement between the appellant and the first respondent, it should be quite obvious if the second respondent was not restrained, it would start processing the call and would accordingly make the payment to the first respondent. These actions would of course defeat the very purpose of requesting interim measures pending arbitration as provided by s 11 of the AA. Besides, the three parties needed for a bank guarantee must certainly include the second respondent as the issuing bank, apart from the appellant and the first respondent. Without the second respondent, there could not be a bank guarantee. Thus, the interim measure under s 11 of the AA could only serve its purpose if the second respondent was also restrained. The second respondent in this sense was a necessary party involved and closely connected in the whole scheme of the grant for interim measures pursuant to this statutory provision of the AA in this case (see paras 28–29).

(3) Although the project site under the EPC contract was in Myanmar, a major part of the fabrication works was to be carried out in Malaysia which was affected by the spread of Covid-19. An extension of time was granted by the first respondent for the appellant to perform the relevant part of the EPC contract by April and May 2020. By that extension of time granted until April and May 2020, Covid-19 had already spread in Malaysia and Act 829 was given retrospective effect from 18 March 2020. Hence, the works for the EPC contract were covered by Act 829. The appellant could not perform the EPC contract because of Covid-19 and Act 829 rendered protection for the appellant against liability in respect of the performance of the EPC contract. The appellant as a Malaysian company should not be prevented to seek refuge under the terms of s 7 of Act 829. This would include the protection against the call of the on-demand bank guarantee. The appellant could seek refuge under the provision of s 7 of Act 829 (see paras 33–34, 37–38, 40 & 43).

(4) The appellant was to furnish to the first respondent a corrective action plan in the event of a 'major performance default' on part of the appellant. The issue on this corrective action plan was a matter under

active discussion between the appellant and the first respondent prior to the termination of the EPC contract. Under that circumstance, it was unreasonable for the first respondent to spring a surprise by calling the bank guarantee. It was also unconscionable as the parties were negotiating and discussing how best to resolve the issue of delay because of the spread of Covid-19 when the call was made by the first respondent (see paras 44–45).

(5) Clause 38.1 of the EPC contract and the learned HCJ's finding on the applicability of the Singapore laws, though could not be strictly disputed, still did not address the fact that the EPC contract could not be performed according to the specified time because of the acute situation in Malaysia in times of Covid-19. The fact remained that a major part of the fabrication works was to be carried out in Malaysia. Thus, s 7 of Act 829 could not simply be ignored. The provision applied for the appellant for it to be excused in not performing the fabrication works in time (see para 49).

(6) Although Singapore law was stipulated as the governing law for the EPC contract, the facts of the appeal and the justice of the case, demanded and required the Malaysian law ie s7 of Act 829 to be applied and enforced instead (see para 52).

(7) The general principle that a statute was confined only within its limited jurisdiction unless there was clear express language specifying otherwise, was immaterial because the relevant circumstance was that the construction of the liquefied petroleum gas ('LPG') tanks in Malaysia had been affected by Covid-19. Thus, s 7 of Act 829 indeed applied to the appellant and the statute need not be applied beyond territorial jurisdiction based on the facts of the case. It must be stressed, Malaysia was where the LPG tanks were supposed to be constructed. Therefore, Act 829 should be applied (see paras 53–54).

[Bahasa Malaysia summary

Responden pertama, sebuah syarikat Myanmar, menganugerahkan perayu satu kontrak ('kontrak EPC'). Menurut kontrak EPC, perayu hendaklah menyediakan jaminan bank kepada responden pertama yang kemudiannya didepositkan kepada responden kedua oleh perayu. Selepas itu, timbul pertikaian antara perayu dan responden pertama berhubung prestasi kontrak EPC. Akibatnya, melalui surat bertarikh 17 Mei 2021, responden pertama memberikan notis untuk menamatkan kontrak EPC. Sebelum itu, melalui surat bertarikh 10 Mei 2021 kepada responden kedua tetapi tanpa memberitahu perayu, responden pertama menuntut daripada responden kedua jumlah wang di bawah jaminan bank. Hanya pada 19 Mei 2021 responden pertama telah memaklumkan tuntutan kepada perayu kepada responden kedua. Perayu memfailkan saman pemula ('OS'), antara lain,

injunksi untuk menghalang responden pertama daripada menerima hasil daripada jaminan bank. Hakim Mahkamah Tinggi yang bijaksana telah menolak OS perayu dan oleh itu rayuan ini. Isu-isu untuk pertimbangan adalah: (a) sama ada perintah pengisytiharan boleh dikeluarkan; (b) sama ada responden kedua boleh dihalang; (c) sama ada perayu boleh dilindungi oleh s 7 Akta Langkah-Langkah Sementara bagi Mengurangkan Kesan Penyakit Koronavirus 2019 (Covid-19) 2020 ('Akta 829'); (d) sama ada tindakan responden pertama adalah tidak munasabah dan tidak wajar dalam memanggil jaminan bank; (e) sama ada peruntukan berkanun Malaysia boleh diabaikan memandangkan undang-undang Singapura yang terpakai; (f) sama ada undang-undang Malaysia akan digunakan; dan (g) sama ada terma s 7 Akta 829 mempunyai pemakaian luar wilayah.

Diputuskan, membenarkan rayuan:

(1) Hakim Mahkamah Tinggi ('HCJ') yang bijaksana terkhilaf dalam kesimpulannya bahawa menurut s 11 Akta Timbang Tara 2005 ('AA'), hanya perintah interim boleh diberikan tetapi bukan perintah pengisytiharan. Dalam *KNM Process Systems Sdn Bhd v Lukoil Uzbekistan Operating Company LLC* [2020] MLJU 85, pengisytiharan sememangnya telah diberikan yang menghalang panggilan jaminan bank. Tambahan lagi, dalam Kining *Exeton Sdn Bhd v Majlis Perbandaran Kuantan & Anor* [2020] MLJU 343, juga memberikan perintah pengisytiharan. Oleh itu, perintah pengisytiharan dan bukan hanya perintah sementara boleh diberikan menurut s 11 AA (lihat perenggan 23 & 25–26).

(2) Walaupun responden kedua bukan pihak dalam perjanjian timbang tara antara perayu dan responden pertama, ia sepatutnya jelas jika responden kedua tidak dihalang, ia akan mula memproses panggilan dan sewajarnya akan membuat pembayaran kepada responden pertama. Tindakan ini sudah tentu akan mengalahkan tujuan memohon langkah interim sementara menunggu timbang tara seperti yang diperuntukkan oleh s 11 AA. Selain itu, ketiga-tiga pihak yang diperlukan untuk jaminan bank sudah tentu perlu memasukkan responden kedua sebagai bank pengeluar, selain daripada perayu dan responden pertama. Tanpa responden kedua, tidak mungkin ada jaminan bank. Oleh itu, langkah interim di bawah s 11 AA hanya boleh dipenuhi tujuannya jika responden kedua juga dihalang. Responden kedua dalam pengertian ini adalah pihak yang perlu terlibat dan berkait rapat dalam keseluruhan skim pemberian untuk langkah interim menurut peruntukan berkanun AA dalam kes ini (lihat perenggan 28–29).

(3) Walaupun tapak projek di bawah kontrak EPC adalah di Myanmar, sebahagian besar kerja pemasangan akan dijalankan di Malaysia yang terjejas oleh penularan Covid-19. Lanjutan masa telah diberikan oleh

responden pertama untuk perayu melaksanakan bahagian berkaitan kontrak EPC selewat-lewatnya pada April dan Mei 2020. Dengan lanjutan masa yang diberikan sehingga April dan Mei 2020, Covid-19 telah pun merebak di Malaysia dan Akta 829 telah diberi kesan retrospektif mulai 18 Mac 2020. Oleh itu, kerja-kerja kontrak EPC dilindungi oleh Akta 829. Perayu tidak boleh melaksanakan kontrak EPC kerana Covid-19 dan Akta 829 memberi perlindungan kepada perayu terhadap liabiliti berkenaan dengan pelaksanaan kontrak EPC. Perayu sebagai syarikat Malaysia tidak seharusnya dihalang untuk mendapatkan perlindungan di bawah terma s 7 Akta 829. Ini termasuk perlindungan terhadap panggilan jaminan bank atas permintaan. Perayu boleh mendapatkan perlindungan di bawah peruntukan s 7 Akta 829 (lihat perenggan 33–34, 37–38, 40 & 43).

(4) Perayu hendaklah memberikan kepada responden pertama pelan tindakan pembetulan sekiranya berlaku 'kemungkiran prestasi utama' pada bahagian daripada perayu. Isu mengenai pelan tindakan pembetulan ini adalah perkara yang sedang dibincangkan secara aktif antara perayu dan responden pertama sebelum penamatan kontrak EPC. Dalam keadaan itu, adalah tidak munasabah untuk responden pertama membuat kejutan dengan memanggil jaminan bank. Ia juga tidak wajar kerana kedua-dua pihak sedang berunding dan membincangkan cara terbaik untuk menyelesaikan isu kelewatan akibat penularan Covid-19 apabila panggilan dibuat oleh responden pertama (lihat perenggan 44–45).

(5) Klausa 38.1 kontrak EPC dan penemuan HCJ yang bijaksana mengenai kebolehgunaan undang-undang Singapura, walaupun tidak boleh dipertikaikan dengan tegas, masih tidak menangani fakta bahawa kontrak EPC tidak dapat dilaksanakan mengikut masa yang ditetapkan kerana situasi teruk di Malaysia pada masa Covid-19. Hakikatnya tetap bahawa sebahagian besar kerja-kerja pemasangan akan dijalankan di Malaysia. Oleh itu, s 7 Akta 829 tidak boleh diabaikan begitu sahaja. Peruntukan tersebut terpakai agar perayu dikecualikan kerana tidak melaksanakan kerja-kerja pemasangan tepat pada masanya (lihat perenggan 49).

(6) Walaupun undang-undang Singapura ditetapkan sebagai undang-undang yang mengawal kontrak EPC, fakta rayuan dan keadilan kes, menuntut dan memerlukan undang-undang Malaysia iaitu s 7 Akta 829 untuk digunakan dan dikuatkuasakan sebaliknya (lihat perenggan 52).

(7) Prinsip am bahawa sesuatu statut dihadkan hanya dalam bidang kuasa terhadnya melainkan terdapat bahasa nyata yang jelas menyatakan sebaliknya, adalah tidak material kerana keadaan yang berkaitan ialah pembinaan tangki gas petroleum cecair ('LPG') di Malaysia telah terjejas

oleh Covid-19. Justeru, s 7 Akta 829 sememangnya terpakai kepada perayu dan statut itu tidak perlu digunakan di luar bidang kuasa wilayah berdasarkan fakta kes. Perlu ditegaskan, Malaysia adalah tempat tangki LPG sepatutnya dibina. Oleh itu, Akta 829 perlu digunakan (lihat perenggan 53–54).]

Cases referred to

Ahmad Zaki Sdn Bhd v SN Akmida Holdings Sdn Bhd [2021] MLJU 644; [2021] 5 AMR 67, CA (refd)

KNM Process Systems Sdn Bhd v Cypark Sdn Bhd [2020] 10 MLJ 321, HC (refd)

KNM Process Systems Sdn Bhd v Lukoil Uzbekistan Operating Company LLC [2020] MLJU 85; [2020] 1 LNS 479, CA (refd)

Kining Exeton Sdn Bhd v Majlis Perbandaran Kuantan & Anor [2020] MLJU 343; [2020] 1 LNS 217, HC (refd)

Scandinavian Bunkering (Singapore) Pte Ltd v MISC Bhd [2015] 3 MLJ 753, FC (refd)

Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd [2012] 4 MLJ 1; [2012] 3 CLJ 401, FC (refd)

Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd and another appeal [2020] 3 MLJ 545; [2020] 4 CLJ 301, FC (refd)

Legislation referred to

Arbitration Act 2005 s 11

Covid-19 (Temporary Measures) Act 2020 [SG]

Prevention and Control of Infectious Diseases Act 1988

Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) Act 2020 ss 7, Schedule, items 1, 2, Part II

Appeal from: *KNM Process Systems Sdn Bhd v Ceca Gold Company Limited & Anor* [2021] MLJU 2518 (High Court, Shah Alam)

Michael Chow Keat Thye (with Yeong Wen Ling) (Michael Chow) for the appellant.

Chong Yee Leong (with Yap Yeow Han and Yap Mei Yan) (Rahmat Lim & Partners); Khor Wan Yin (Shaikh David & Co) for the respondent.

Abu Bakar Jais JCA:

INTRODUCTION

[1] We had allowed the appellant's appeal against the decision of the High Court which dismissed the appellant's originating summons for among others, an injunction to restrain the first respondent from receiving the proceeds under an unconditional on demand bank guarantee.

[2] In reversing the decision of the High Court, we gave the declaration that the demand made by the first respondent on the bank guarantee issued by the second respondent is invalid and unlawful. We also ordered that the first respondent is not to receive the proceeds of that bank guarantee.

[3] The respondents are aggrieved by our decision and hence our reasons for the same are explained hereafter.

BACKGROUND FACTS

[4] The first respondent, a Myanmar company, awarded the appellant a contract dated 31 December 2018 called lump sum turnkey contract for the engineering, procurement, and construction of a liquefied petroleum gas ('LPG') receiving, tanking, storage and bottling facility at Land No 607, Ga Yan Kwin, No 1(e), Thida, Myaing Ward, Kyaut Tan Township Thilawa, Myanmar ('EPC contract').

[5] Pursuant to the EPC contract, the appellant is to provide a bank guarantee to the first respondent for the amount of USD2,487,200 being 10% of the contract price of USD24,872,000. This amount was later deposited in the second respondent by the appellant.

[6] Subsequently, disputes arose between the appellant and first respondent regarding the performance of the EPC contract. As a consequence, by a letter dated 17 May 2021, the first respondent gave the notice to terminate the EPC contract. Prior to that, by way of a letter dated 10 May 2021 to the second respondent but without notifying the appellant, the first respondent demanded from the second respondent the sum of USD2,487,200 under the bank guarantee. Only on 19 May 2021 the first respondent informed the appellant of the demand to the second respondent.

[7] The crux of the dispute before us is the call for the bank guarantee made by the respondent against the appellant.

AT THE HIGH COURT

[8] The originating summons ('OS') filed by the appellant at the High Court ('HC') requested for the following prayers:

(a) a declaration that the call for the bank guarantee by the first respondent is invalid ('Prayer 1');

(b) an injunction preventing the first respondent from receiving proceeds from the bank guarantee ('Prayer 2'); and

(c) an injunction against the second respondent from paying the proceeds of the bank guarantee to the first respondent ('Prayer 3').

[9] The learned High Court judge ('HCJ') dismissed the appellant's OS on the following grounds:

(a) the first respondent is entitled to terminate the EPC contract as the appellant had breached the terms of the same;

(b) the second respondent could not be restrained to make payment to the first respondent as the latter had made a call on the bank guarantee;

(c) Singapore law is the governing law pursuant to a term of the EPC contract and the call made by the first respondent;

(d) based on expert opinion produced by the first respondent, the call was valid under Singapore law;

(e) the call cannot be nullified by s 7 of the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) Act 2020;

(f) the above is not applicable because:

(i) the appellant's non-performance happened before the Covid-19 pandemic and before the above statutory provision came into effect;

(ii) the non-performance of the appellant under the EPC contract was not caused by the measures taken under the Prevention and Control of Infectious Diseases Act 1988;

(iii) the second respondent was not under any inability to honour the first respondent's call; and

(iv) even if the second respondent was under an inability to comply with the first respondent's demand, such an inability was not due to the Prevention and Control of Infectious Diseases Act 1988.

(g) the appellant had no seriously arguable case, nor a strong prima facie case that the first respondent's call is unconscionable;

(h) balance of convenience lies in not granting the injunction;

(i) the ability to provide for damages was against the appellant; and

(j) merits of the disputes must be decided by arbitration and not by the court and therefore no declaration can be given by the court under s 11 of the Arbitration Act 2005.

SUMMARY OF THE CONTENTIONS

[10] Before us, the appellant submitted that the demand for the bank guarantee is unreasonable and unconscionable.

[11] The appellant also argued that it is protected by statutory provision in the performance of the EPC contract to prevent the spread of Covid-19 and the first respondent is estopped to exercise its right under the EPC contract because of this protection in law given to the appellant.

[12] It was also contended that there were discussions and negotiations between the appellant and the first respondent in resolving the disputes between both parties prior to the calling of the bank guarantee.

[13] The first respondent in turn argued that the bank guarantee is an on-demand guarantee as reflected in its terms. The first respondent said it has the right to be paid once the demand is made.

[14] The first respondent also submitted that the appellant had failed to perform its obligations in the EPC contract.

[15] It is also contended that the appellant failed to deliver the LPG tanks in time pursuant to the terms of the EPC contract.

[16] The appellant's purported corrective action plan was manifestly unacceptable to the first respondent.

[17] The law applicable in respect of EPC contract should have been the Singapore laws.

[18] The second respondent did not file any written submissions and must have taken the approach it is not supporting nor objecting to the OS. It took a neutral stance. This is rightly so as it will merely obey what the court is to decide. If it strongly supports the appeal, it would have not disregarded the instruction of the court to file written submissions during case management. However, this approach by the second respondent should not at all be construed negatively as the matrix of this case points to the fact that whatever the decision on this appeal, it should not affect the second respondent in any significant way as the issuing bank.

A OUR DECISION

[19] There are only a few relevant issues in our view that are material for deliberation to indicate why the present appeal should be allowed. These issues are decisive in support of the appellant's appeal, even when the elaboration of the reasons for the judgment by the learned HCJ is considered and the counter arguments of the first respondent are examined.

[20] However, before these issues are highlighted, it is appropriate to note s 11 of the Arbitration Act 2005 ('the AA') which was referred to by the learned HCJ as the statutory provision governing the appellant's OS. This section of the AA states as follows:

> (1) A party may, before or during arbitral proceedings, apply to a High Court for any interim measure and the High Court may make the following orders for the party to —
>
> (a) maintain or restore the status quo pending the determination of the dispute;
>
> (b) take action that would prevent or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process;
>
> (c) provide a means of preserving assets out of which a subsequent award may be satisfied, whether by way of arrest of property or bail or other security pursuant to the admiralty jurisdiction of the High Court;
>
> (d) preserve evidence that may be relevant and material to the resolution of the dispute; or
>
> (e) provide security for the costs of the dispute.
>
> (2) Where a party applies to the High Court for any interim measure and an arbitral tribunal has already ruled on any matter which is relevant to the application, the High Court shall treat any findings of fact made in the course of such ruling by the arbitral tribunal as conclusive for the purposes of the application.
>
> (3) This section shall also apply in respect of an international arbitration, where the seat of arbitration is not in Malaysia.

[21] The above statutory provision is relevant in the determination of whether the interim measure of restraining the call on the bank guarantee pending arbitration ought to be granted to the appellant.

First issue — Can a declaratory order be issued

[22] In respect of Prayer 1, the learned HCJ followed his own decision in *KNM Process Systems Sdn Bhd v Cypark Sdn Bhd* [2020] 10 MLJ 321 ('Cypark') to dismiss the same. Following *Cypark*, the learned HCJ said the merits of the dispute between the parties cannot be decided by the court as the parties had

agreed that the dispute shall be decided in the arbitration. Thus, Prayer 1 for a declaration that the call for the bank guarantee by the first respondent is invalid is refused by the HC. In this regard, the learned HCJ is of the view, s 11 of the AA narrated above, allows for interim order but not a declaratory order.

[23] With respect, we are of the considered opinion the learned HCJ erred in his conclusion that pursuant to s 11 of the AA as shown above, only interim orders could be granted but not a declaratory order. We say this because in the Court of Appeal case of *KNM Process Systems Sdn Bhd v Lukoil Uzbekistan Operating Company LLC* [2020] MLJU 85; [2020] 1 LNS 479 a declaration was indeed granted restraining the calling of the bank guarantees. In fact, the facts of this case are similar to our present case. It is also about an OS filed under s 11 of AA for interim measures by the HC pursuant to an arbitration agreement and it is also about restraining the call for bank guarantees. In addition, in this case too a declaration was requested that the call was invalid, the same declaration as in Prayer 1 in our case.

[24] Mary Lim JCA (now FCJ) in disallowing the call said:

> [87] ... We unanimously agree that the learned judge had not exercised discretion correctly on the facts and on the law when refusing to grant the interim injunction on the terms sought by the appellant. The balance of convenience leans in granting a restraining order on all three calls so that the validity of the calls may be finally determined at the arbitration. Such a restraining order will in our regard, surely aid, support and facilitate the arbitration of the substantive dispute that started before the High Court in the first place.
>
> [86] Accordingly, we allow the appeal and set aside the decision of the High Court with costs. We further grant prayer (2) as appearing in the originating summons at p 35 of the record of appeal.

[25] Further, the HC in *Kining Exeton Sdn Bhd v Majlis Perbandaran Kuantan & Anor* [2020] MLJU 343; [2020] 1 LNS 217, also granted such declaratory order. The facts in *Kining*, likewise are also similar to the facts of the present case. In *Kining* too an OS was filed pursuant to s 11 of the AA for a declaration that a demand for a bank guarantee was invalid, null and void. Having considered the arguments, the HC in *Kining* granted the declaration as requested.

[26] Thus, the above two cases are authorities that a declaratory order and not merely interim orders could be given pursuant to s 11 of the AA. These two cases are proof that granting a declaratory order is not alien in the context of this statutory provision.

Second issue — Can the second respondent be restrained

[27] Related to s 11 AA, the learned HCJ is also of the finding that the second respondent as the issuing bank for the bank guarantee cannot be restrained to honour the call. This is because the second respondent is not a party to the arbitration agreement.

[28] We respectfully disagree with the learned HCJ on this point. Although, the second respondent is not a party to the arbitration agreement between the appellant and first respondent, it should be quite obvious if the second respondent is not restrained, it will start processing the call and will accordingly make the payment to the first respondent. These actions will of course defeat the very purpose of requesting interim measures pending arbitration as provided by s 11 of the AA.

[29] Besides, the three parties needed for a bank guarantee must certainly include the second respondent as the issuing bank, apart from the appellant and the first respondent. Without the second respondent, there cannot be a bank guarantee. Thus, the interim measure under s 11 of the AA can only serve its purpose if the second respondent is also restrained. The second respondent in this sense is a necessary party involved and closely connected in the whole scheme of the grant for interim measures pursuant to this statutory provision of the AA in this case.

Third issue — Can the appellant be protected by s 7 of the temporary measures for reducing the impact of Coronavirus Disease 2019 (COVID-19) Act 2020 ('Act 829')

[30] The appellant submitted it is excused from performing its contractual obligation to the first respondent by virtue of s 7 of Act 829 that states as follows:

> The inability of any party or parties to perform any contractual obligation arising from any of the categories of contracts specified in the Schedule to this Part due to the measures prescribed, made or taken under the Prevention and Control of Infectious Diseases Act 1988 [Act 342] to control or prevent the spread of COVID-19 shall not give rise to the other party or parties exercising his or their rights under the contract.

[31] The appellant also relied on items 1 and 2 of the relevant Schedule mentioned above which states as follows:

> List Of Categories Of Contracts
>
> 1. *Construction work contract or construction consultancy contract and any other contract related to the supply of construction material, equipment or workers in connection with a construction contract*

2. *Performance bond or equivalent that is granted pursuant to a construction contract or supply contract*

3. Professional services contract

4. Lease or tenancy of non-residential immovable property

5. Event contract for the provision of any venue, accommodation, amenity, transport, entertainment, catering or other goods or services including, for any business meeting, incentive travel, conference, exhibition, sales event, concert, show, wedding, party or other social gathering or sporting event, for the participants, attendees, guests, patrons or spectators of such gathering or event

6. Contract by a tourism enterprise as defined under the Tourism Industry Act 1992 [Act 482] and a contract for the promotion of tourism in Malaysia

7. Religious pilgrimage-related contract

8. Hire-purchase agreement as defined under Hire-Purchase Act 1967 [Act 212] or leasing contract, that has been entered into by micro enterprises, B40 or M40 class of persons as specified in the Inland Revenue Board of Malaysia database, as the case may be, for the following vehicles:

(a) motor vehicles as classified under section 5 of the Road Transport Act 1987 [Act 333];

(b) goods or public service vehicle —

(i) in relation to Peninsular Malaysia, has the meaning assigned to it in the Land Public Transport Act 2010 [Act 715]; or

(ii) in relation to Sabah, Sarawak and Federal Territory of Labuan, has the meaning assigned to it in the Commercial Vehicles Licensing Board Act 1987 [Act 334]; or

(c) tourism vehicle —

(i) in relation to Peninsular Malaysia, has the meaning assigned to it in the Land Public Transport Act 2010 [Act 715]; or

(ii) in relation to Sabah, Sarawak and Federal Territory of Labuan, has the meaning assigned to it in the Tourism Vehicles Licensing Board 1999 [Act 594]

9. Credit sales contract under the Consumer Protection Act 1999 [Act 599]. (Emphasis added.)

[32] Therefore, the appellant contended the first respondent must not call on the bank guarantee as the performance of the EPC contract is affected by Covid-19.

[33] In respect of this issue, first, we are of the view although the project site under the EPC contract is in Myanmar, a major part of the fabrication works is to be carried out in Malaysia. This is proven by the list of approved vendors in Schedule 22 of the EPC contract.

[34] Second, since the beginning of March 2020, it is not disputed that Malaysia was affected by the spread of Covid-19. There were various lockdowns imposed by the Malaysian Government since then. The appellant informed the first respondent about this, first, by a letter dated 17 March 2020. Then various updates were sent to the first respondent by the appellant until 10 February 2021. In this regard, the movement control orders ('MCO') issued by the Malaysian Government because of the spread of Covid-19 had affected not only the performance of the EPC contract but it is also common knowledge, other contracts had been impacted as well, involving many other unrelated parties to the EPC contract. It is also very important to note, the lockdowns and MCOs are not one-off, isolated incident but a sustained, continuous episode for the very least, more than two years.

[35] In this regard, it is also important to note Act 829 has been *gazetted* on 23 October 2020 and Part II of the Act 829 is given retrospective effect from 18 March 2020. Act 829 has been passed by the Parliament precisely to deal with the very situation at hand. In this regard it is to be noted that pursuant to PU(A) 313, the operation of Act 829 in particular s 7, has been further extended until 31 December 2021.

[36] It was the finding of the learned HCJ that pursuant to the EPC contract, it was the appellant's obligation to deliver the first and second LPG tanks on 27 November 2019 and the third and fourth LPG tanks by 27 December 2019. Thus, these dates are well before the retrospective date of Act 829. However, this is immaterial because the correspondence between the appellant and the first respondent showed parties agreed to an extension of time on the delivery of these tanks.

[37] The correspondence showed in February and March 2020 (pp 692–696 of encl 25), that despite the delay on the part of the appellant in delivering the LPG tanks, an extension of time was granted by the first respondent for the appellant to perform the relevant part of the EPC contract by April and May 2020, before the monsoon season in Myanmar. Thus, the dates to deliver the LPG tanks as found by the learned HCJ above for the first and second LPG tanks on 27 November 2019 and the third and fourth LPG tanks by 27 December 2019 are insignificant because of this extension of time granted to the appellant.

[38] By that extension of time granted until April and May 2020, Covid-19 had already spread in Malaysia and as said earlier, Act 829 is given retrospective effect from 18 March 2020. Hence, the works for the EPC contract are covered by Act 829. The appellant could not perform the EPC contract because of Covid-19 and Act 829 renders protection for the appellant against liability in respect of the performance of the EPC contract.

[39] This issue should be decided in the arbitration. However, by virtue of s 11 of the AA as explained earlier, at this stage, the appellant is at liberty to seek for interim measures on the calling of the bank guarantee, which will also relate to and involve the issue of Covid-19 and its direct implications to the issue of the performance of the EPC contract during the arbitration. Meanwhile, the court is empowered to grant the interim measures at this stage before the issues are arbitrated. Section 11 of the AA is applicable to preserve the status quo of the parties including on the lawfulness of the call on the bank guarantee by the first respondent because the calling of the bank guarantee does affect the rights of both parties. In this regard, the Court of Appeal case of *Ahmad Zaki Sdn Bhd v SN Akmida Holdings Sdn Bhd* [2021] MLJU 644; [2021] 5 AMR 67 is relevant where it is held:

> The respondent has the right to seek the injunction by relying on s 11(1)(a) and (b) of the AA 2005 to respectively maintain the status quo pending arbitration of the disputes and to take action that would prevent anything that is likely to cause current or imminent harm or prejudice to the arbitral process. The language of s 11(1)(a) and (b) of the AA 2005 is wide enough to be used to restrain the appellant from calling on the PB and APG. Bearing in mind the agreement between the parties for disputes affecting them to be referred to arbitration, the appellant with respect, erred in contending that the issue should not first be referred to arbitration and should only be decided by the court. Contrary to the appellant's submission, the statutory provisions of s 11(1)(a) and (b) of the AA 2005 clearly apply as regards the PB and the APG.

[40] As s 7 of Act 829 is applicable to the appellant, it is of no consequence that the bank guarantee is payable on demand. This statutory provision caters to the need to deal with the spread of Covid-19 affecting Malaysian business, commerce and trade. It also grants protection to parties who ought not to be liable because of the pandemic, as provided also by the legislations of other countries in protecting their own companies. It is enacted to deal with the non-performance of contracts, including the EPC contract in times of extreme difficulties. The appellant as a Malaysian company should not be prevented to seek refuge under the terms of s 7 of Act 829. This will include the protection against the call of the on-demand bank guarantee.

[41] The purpose and intent of Act 829 as stated in the preamble to the Act is also applicable in the circumstances of this case. It provides as follows:

> An Act to provide for temporary measures to reduce the impact of Coronavirus Disease 2019 (COVID-19) ...

[42] The Hansard to Act 829 is also relevant as it states as follows:

> Dalam erti kata lain, rang undang-undang ini merupakan pelengkap atau, dengan izin, complement kepada usaha-usaha kerajaan membantu rakyat melalui proses pemulihan ekonomi akibat COVID-19. Rang undang-undang ini memberikan

> suatu pelepasan sementara-temporary relief, dengan izin, daripada tanggungjawab perjanjian atau pematuhan kepada perundangan tertentu bagi suatu tempoh yang ditetapkan demi kelangsungan hidup rakyat.
>
> ...
>
> Ini adalah selaras dengan hasrat kerajaan supaya rang undang-undang ini tidak bersifat menghukum yang membebankan mana-mana pihak. COVID-19 tidak memilih mangsanya, virus ini tidak mengenal yang kaya atau yang miskin, majikan atau pekerja, peniaga atau pembeli, yang berada di bandar atau di desa. Kesan COVID-19 dirasai oleh semua pihak dan apabila satu pihak terkesan, bermakna seluruh rantaian ekonomi akan turut terkesan.

[43] Referring to the preamble and Hansard of Act 829 as shown above, we are also of the considered view that the appellant could seek refuge under the provision of s 7 of Act 829.

Fourth issue — Was the first respondent's action unreasonable and unconscionable in calling the bank guarantee

[44] Clause 34.2.1 of the EPC contract, provides that in the event of what is called a 'major performance default' on the part of the appellant, the same is to furnish to the first respondent a corrective action plan. The learned HCJ decided the first respondent is entitled to terminate the EPC contract arising from this major performance default and the absence of this corrective action plan. The issue of whether the termination of the EPC contract by the first respondent is correctly and justifiably done should have been an issue in the arbitration. This is similar to the Federal Court case of *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd and another appeal* [2020] 3 MLJ 545; [2020] 4 CLJ 301 where Nallini Pathmanthan FCJ said:

> [44] It is evident from the foregoing that any dispute or difference arising in respect of any matter arising under the governing contract is to be referred to arbitration. Clause 34 effectively provides that arbitration is the exclusive dispute resolution choice of the parties.
>
> [45] The clause read in its entirety warrants the construction that a dispute relating to a claim for monies certified, countered by a defence or set-off of defective works, 'shall' be referred to arbitration. The use of the word 'shall' underscores the mandatory nature of the agreement between the parties. The fact that the dispute falls within the scope of the arbitration clause further fortifies this conclusion.
>
> [46] It therefore follows that unless the arbitration agreement in cl 34 is null, void, inoperable or incapable of being performed, all disputes arising under the governing contract are to be referred to arbitration.

[45] The issue on this corrective action plan was also a matter under active discussion between the appellant and the first respondent prior to the termination of the EPC contract. Parties were in the midst of negotiation and

discussion on the corrective action plan against the backdrop of the spread of Covid-19. Under that circumstance, it was unreasonable for the first respondent to spring a surprise by calling the bank guarantee. It was also unconscionable as the parties were negotiating and discussing how best to resolve the issue of delay because of the spread of Covid-19 when the call was made by the first respondent.

[46] The Federal Court case of *Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd* [2012] 4 MLJ 1; [2012] 3 CLJ 401 is relevant to note unconscionability as an acceptable distinct ground to defeat a call on a performance bond. Abdull Hamid Embong FCJ in delivering the judgment of the court held as follows:

> (1) The principle recognising unconscionability as a separate and distinct ground to restrain a beneficiary from making a call on a performance bond accorded with good commercial sense (*Kejuruteraan Bintai Kindenko Sdn Bhd v Nam Fatt Construction Sdn Bhd & Anor*; *Focal Asia Sdn Bhd & Anor v Raja Noraini Raja Datuk Nong Chik & Anor*). Thus, unconscionability may now be raised as a distinct ground. The determination on whether unconscionability applies in a particular case would therefore depend largely on the material facts.

Fifth issue — Can the malaysian statutory provision be ignored in view of the singapore law applicable

[47] Clause 38.1 provides that the EPC contract 'shall be governed and construed in accordance with the laws of Singapore (without giving effect to the principles thereof relating to conflicts of law)'.

[48] The learned HCJ also found the laws of Singapore shall apply to the first respondent's call on the bank guarantee without giving effect to the principles relating to conflict of laws. The learned HCJ also found the first respondent's call on the bank guarantee was valid under Singapore laws and is not nullified by the Singapore Covid-19 (Temporary Measures) Act 2020.

[49] Clause 38.1 of the EPC contract and the learned HCJ's finding on the applicability of the Singapore laws as explained above, though could not be strictly disputed, still do not address the fact that the EPC contract could not be performed according to the specified time because of the acute situation in Malaysia in times of Covid-19. As explained earlier, the fact remains that a major part of the fabrication works is to be carried out in Malaysia. As said, this is proven by the list of approved vendors in Schedule 22 of the EPC contract. Thus, s 7 of Act 829 could not simply be ignored. This provision applies for the appellant for it to be excused in not performing the fabrication works in time.

Sixth issue — Which law to be applied when there is a conflict of laws

[50] It is not mandatory that the laws of a country expressly stipulated in a contract must be complied and applicable compared to any laws of any other countries not so mentioned in that particular contract. The laws of a particular country not so mentioned could still be applicable depending on the justice and facts of the case.

[51] In the Federal Court case of *Scandinavian Bunkering (Singapore) Pte Ltd v MISC Bhd* [2015] 3 MLJ 753 the contract concerned was governed by English Law. Azahar Mohamed FCJ (later CJM) in delivering judgment applied *lex fori*, Malaysian law instead of the foreign law as agreed by the parties for the contract.

[52] Likewise, in our present appeal, although Singapore law is stipulated as the governing law for the EPC contract, the facts of this present appeal as explained earlier and the justice of the case, demand and require the Malaysian law ie s 7 of Act 829 to be applied and enforced instead.

Seventh issue — Do the terms of s 7 of Act 829 have extra-territorial application

[53] The general principle is that a statute is confined only within its limited jurisdiction unless there is clear express language specifying otherwise. This must include Act 829 including s 7.

[54] However, it must be noted, the above proposition is immaterial because the relevant circumstance here is that the construction of the LPG tanks in Malaysia has been affected by Covid-19. Thus, s 7 of Act 829 indeed applies to the appellant and this statute need not be applied beyond territorial jurisdiction based on the facts of the present case. It must be stressed, Malaysia is where the LPG tanks were supposed to be constructed. Therefore, Act 829 should apply.

CONCLUSION

[55] Based on all the reasons explained, we are unanimous in allowing the appeal and setting aside the High Court's order with costs for the appellant against the first respondent subject to allocator.

Appeal allowed.

Reported by Nabilah Syahida Abdullah Salleh